92-291

No. 92-

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 10, 1992

QUESTION PRESENTED FOR REVIEW

May a court decide whether a proceeding is an independent and removable "civil action" under 28 U.S.C. § 1441 by referring to state, rather than federal, law?

PARTIES TO THE PROCEEDING

Petitioner International Paper Company ("IPC")[1] was the appellant below. Ciba Geigy PLC ("PLC"), named as a defendant in the underlying action, has never appeared in this litigation.

Respondents, all of whom are appellees below, are Alexander Grassi, Sr. and Karen S. Grassi (individually and as next friends of Alexander Grassi, Jr.), Wendi Lu Grassi and Kristen Suzanne Grassi (minors) and IRI Internacional Limitada.

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[1] IPC has no parent company. The following is a list of IPC subsidiaries that are not wholly owned: Rondau Investments Ltd.; Carter Holt Harvey Ltd.; Scitex Corporation Ltd.; Joost & Preuss Versieherungsmakler GnbH; Kanzan Spezial Papiere GnbH; Forest Insurance Ltd.; Z-P Formular GnbH; Etablissments Celerier S.A.; Exploration Forestiere Celerier S.a.r.L.; Promafor S.A.; Rhone Valley Packaging S.A.; Societe Francaise D-A Chats de Rondins S.A.; Union Pour Le Developpement de la Recuperation de Papiers S.A.; Rengo International Products Co. Ltd.; Paper Industries Corporation of the Philippines; Torras Domenech S.A.; and Corporacion Forestal de Venezuela, C.A.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION OF THE COURT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Summary of Facts	2
B. Proceedings Below	3
REASONS FOR GRANTING THE WRIT	5
I. By Holding That the Disposition of a Remand Motion Is Dependent upon State, Rather Than Federal Law, the Fifth Circuit Court of Appeals' Decision Directly Conflicts with the Precedents of This Court	6
II. The Fifth Circuit's Decision Below Directly Conflicts with Holdings of the Second, Fourth, Eighth and Ninth Circuits	7
III. The Fifth Circuit's Decision Below Also Directly Conflicts with Established Fifth Circuit Precedent	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
Able v. Upjohn Company, Inc., 829 F.2d 1330 (4th Cir. 1987)	7
Action Auto Stores, Inc. v. United Capital Insurance Co., No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992)	10
Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223 (Tex. 1991)	11
Brown v. Demco, Inc., 792 F.2d 478 (5th Cir. 1986)	9
Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979)	9, 11
Central of Georgia Ry. Co. v. Riegel Textile Corp., 426 F.2d 935 (5th Cir. 1970)	9
Chicago, R. I. & P. R. Co. v. Stude, 346 U.S. 574 (1954)	7
Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181 (5th Cir. 1990)	2
Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972)	6, 7, 10
Jones v. Roadway Exp., Inc., 931 F.2d 1086 (5th Cir. 1991)	9
McCarthy Western Constructors, Inc. v. Phoenix Resort Corp., 951 F.2d 1137 (9th Cir. 1991)	8
Moore v. Sentry Ins. Co., 399 F. Supp. 929 (S.D. Miss. 1975)	10
Paxton v. Weaver, 553 F.2d 936 (5th Cir. 1977)	9

Cases	Page(s)
Randolph v. Employers Mutual Liability Ins. Co. of Wis., 260 F.2d 461 (8th Cir. 1958)	8
Republic Insurance Company v. Millard, 825 S.W.2d 780 (Tex. App. Houston [14th Dist.] 1992, no writ)	11
Road District v. St. Louis S. W. Ry. Co., 257 U.S. 547 (1922)	7
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)	6, 7, 9, 10
Stoll v. Hawkeye Casualty Co., 185 F.2d 96 (8th Cir. 1950)	8
Toibb v. Radloff, 501 U.S. __, 111 S. Ct. 2197 (1991)	10
Yonkers Racing Corporation v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988)	7
Statutes and Rules	
Texas Civ. Prac. & Rem. § 31.002 (Vernon 1986 and 1991 Supp.)	3
28 U.S.C. § 1254	2
28 U.S.C. § 1332	4
28 U.S.C. § 1441	2, 4, 5, 6, 7, 8, 9, 10
28 U.S.C. § 1445	9
28 U.S.C. § 1446	3, 4
Miscellaneous	
1A Moore's Federal Practice ¶¶ .157 [1.-3], .157 [4.-2], .157 [4.-10] (2d ed. 1992)	5, 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTERNATIONAL PAPER COMPANY respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 1, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit herein is reported at 961 F.2d 558 (5th Cir. 1992). This decision vacated the remand order of the United States District Court for the Southern District of Texas, Civil Action No. B-90-174 (D.Tex. Dec. 13, 1991). The opinion of the Court of Appeals is reprinted in Appendix A; the Memorandum and Order of the District Court is reprinted in Appendix B.

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 1, 1992, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 30, 1992. (App. C) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation of 28 U.S.C. § 1441 which is entitled "Actions Removable Generally". Because of its length, the text of the statute is set forth in Appendix D.

STATEMENT OF THE CASE

A. Summary of Facts

This case arises from a 1983 products liability action involving insulating material which was allegedly manufactured, in part, by PLC, a subsidiary of Ciba Geigy, Ltd. ("Limited"), and installed by another party in plaintiffs' house. PLC did not appear in this action, and in 1986 plaintiffs below (respondents here) obtained a default judgment against PLC for the sum of $21,382,843. (App. 2a) Since then, respondents have initiated three separate actions to collect the judgment from three persons not party to the original judgment and in each case have attempted to prevent the exercise of the defendant's right of removal.

First, in 1988, respondents filed an action against Limited seeking to enforce the default judgment against PLC, which Limited removed to federal court. *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 182 (5th Cir. 1990). The district court denied respondents' remand motion, concluding that respondents had assigned a two percent interest in their default judgment to a Costa Rican corporation, IRI Internacional Limitada, for the purpose of destroying federal subject matter jurisdiction. The Fifth Circuit of Appeals affirmed that decision on February 16, 1990. *Id.* at 186.

Second, on October 26, 1988, respondents filed an application for turnover relief, relying on the Texas turnover statute, Tex. Civ. Prac. & Rem. § 31.002 (Vernon 1986 and 1991 Supp.), to reach the shares of Ilford Photo Corporation ("Ilford Photo").[2] Employing a different stratagem to defeat federal jurisdiction, respondents brought this post-judgment action under the 1983 state court docket number. Ilford Photo removed the action, but in an order of March 14, 1989, the district court remanded it on the ground that § 1446(b) barred removal of cases commenced more than a year prior to removal. On August 29, 1990, respondents voluntarily dismissed the action against Ilford Photo.

Third, respondents brought this fraudulent conveyance action against IPC, a total stranger to the underlying products liability action, but styled this action a "First Amended Application for Turnover Relief" in order to file it under the caption of the earlier products liability action against PLC which was concluded by the entry of a default judgment in 1986. Respondents have sought to divest the federal courts of removal jurisdiction of a new claim—here for a fraudulent conveyance—against a new party, IPC, which unlike Ilford Photo, has never had any corporate affiliation with PLC, by the contrivance of captioning this civil action with the docket number of a closed action.

B. Proceedings Below

On August 29, 1990, respondents filed a fraudulent conveyance action seeking relief against IPC, which they styled First Amended Application for Turnover Relief ("Turnover Application"), in order to file it under the caption of a closed 1983 products liability lawsuit in which plaintiffs obtained a default judgment against Ciba Geigy PLC ("PLC") in 1986. Petitioner IPC timely removed this action on September 21,

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[2] Ilford Photo was a Delaware corporation headquartered in Paramus, New Jersey, engaged in the photographic business which was a subsidiary of PLC, but had no relation to the events concerning plaintiffs' 1983 products liability action. Ilford Photo was part of the Ilford group of companies which was sold to IPC on April 6, 1989.

1990, to the United States District Court for the Southern District of Texas, Brownsville Division, on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a)(1),[3] pursuant to 28 U.S.C. § 1441(a) and (b). Respondents filed a motion to remand, claiming that the removed action constituted a "continuation" of the products liability action in which a final judgment was entered in 1986, and that, therefore, removal was barred by the one-year limitation upon removal under 28 U.S.C. § 1446(b).[4]

On December 13, 1991, the district court remanded this action after finding that the disposition of the remand motion was inextricably intertwined with the merits of respondents' fraudulent conveyance action. (App. B) As the Fifth Circuit concluded, "the Court remanded the case because '[i]n the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.'" (App. 6a, *quoting* Memorandum and Order, App. 3b)

Petitioner IPC petitioned the Fifth Circuit Court of Appeals for a writ of mandamus and appealed the remand. On June 1, 1992, the Fifth Circuit unanimously granted the mandamus petition, vacated the district court's remand order and dismissed the appeal. It remanded the action to the district court to decide "whether, under Texas law, a plaintiff may seek turnover relief

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[3] That section provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;"

28 U.S.C. § 1332 (a)(1).

[4] Section 1446(b) provides in part:

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA [the Uniform Fraudulent Transfer Act] and thus the original defendant (the judgment debtor) retains ownership or control of the property". (App. 8a) The Court concluded that "[t]he key jurisdictional question is . . . whether the Grassis can seek to prove that there was fraud in the transfer as part of their attempt to obtain relief under the turnover statute." *Id.*

Because the Fifth Circuit panel's decision regarding the application of state law to a § 1441 removal decision directly contravened earlier rulings of the Fifth Circuit and this Court, IPC petitioned the Fifth Circuit for a Rehearing and Suggestion for Rehearing En Banc. On June 30, 1992, the Fifth Circuit denied the petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that the determination of whether a turnover application is a separate "civil action" under § 1441 depends on state, rather than federal law, directly contradicts established precedents of this Court and every Court of Appeals that has considered the issue in modern times. As such, the Fifth Circuit's ruling sets a dangerous and conflict laden precedent. Left uncorrected, the Fifth Circuit's decision would allow § 1441 removal decisions to be decided on the basis of state law, thereby eliminating the possibility of a uniform federal standard that can be applied by district courts. The error in the Fifth Circuit's analysis has ramifications ranging far beyond the confines of this case and needs to be corrected.

It is critical that the Court rule on this issue at this point in time. Since a district court's remand order is generally not reviewable by appeal or otherwise, denial of this petition may result in this case wending its way through lengthy proceedings in a state court which has erroneously been granted jurisdiction. 1A Moore's Federal Practice ¶¶ .157 [1.-3] (2d ed. 1992).

I. By Holding That the Disposition of a Remand Motion Is Dependent upon State, Rather Than Federal Law, the Fifth Circuit Court of Appeals' Decision Directly Conflicts with the Precedents of This Court.

The narrow issue before the district court was whether the turnover application was a separate "civil action" under § 1441, removable to federal court. As set forth below, the answer to this question depends upon federal, not state, law. But without any discussion of the controlling authorities, the Fifth Circuit remanded to the district court to determine this issue *under Texas law* and instructed the court to decide whether the fraudulent conveyance claim was properly brought as a Turnover Application under state law. (App. 8a) To IPC's knowledge, this is the only decision by a United States Court of Appeals in modern times to hold that the question of whether a state proceeding is an independent "civil action", removable under 28 U.S.C. § 1441, is to be determined by reference to state law.

This Court has repeatedly held that the removal statutes are to be interpreted under federal and not state law. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held that Texas procedural rules cannot affect removal jurisdiction:

> "While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application."

Id. at 705. Likewise, in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), this Court rejected the claim that the definition of "defendant" under § 1441 depended upon Texas practice:

> "[T]hat decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by the state statutes or decisions. . . . The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be

> construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

Id. at 104. *See also Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954) (a state's "procedural provisions cannot control the privilege of removal granted by the Federal statute"); *Road District v. St. Louis S. W. Ry. Co.*, 257 U.S. 547, 551 (1922) (holding under predecessor to § 1441 that whether an action is "a suit at common law" does not depend upon state court characterization of the proceeding); 1A Moore's Federal Practice ¶¶ .157 [1.-3], .157 [4.-2], .157 [4.-10] (2d ed. 1992) (federal law controls the construction of § 1441). Because the Fifth Circuit's decision directly contradicts the rulings of this Court, this petition for a Writ of Certiorari should be granted.

II. The Fifth Circuit's Decision Below Directly Conflicts with Holdings of the Second, Fourth, Eighth and Ninth Circuits.

The Fifth Circuit's decision below is, to IPC's knowledge, the only decision by a United States Court of Appeals in modern times to hold that the question of whether a proceeding is an independent and removable "civil action" for § 1441 purposes is to be interpreted under state, rather that federal, law. On the other hand, the Second, Fourth, Eighth and Ninth Circuits have expressly held that federal law controls the interpretation of federal removal statutes.

In *Yonkers Racing Corporation v. City of Yonkers*, 858 F.2d 855, 862 (2d Cir. 1988), the Second Circuit cited *Shamrock*, 313 U.S. at 104, for the proposition that state procedural law cannot supersede the privilege of removal granted by a federal statute.

In *Able v. Upjohn Company, Inc.*, 829 F.2d 1330, 1333 n.2 (4th Cir. 1987), the Fourth Circuit held that "[c]onstruction of the removal statutes is purely a matter of federal law" and that "[c]ourts must look to federal criteria, 'irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts'". *Id.*, *quoting Grubbs*, 405 U.S. at 705.

In *Randolph v. Employers Mutual Liability Ins. Co. of Wis.*, 260 F.2d 461 (8th Cir. 1958), the Eighth Circuit affirmed that "the question whether a civil action is removable and has been properly removed is one for the consideration of the federal court and is not controlled by state law". *Id.* at 463, *quoting Stoll v. Hawkeye Casualty Co.*, 185 F.2d 96, 99 (8th Cir. 1950). The conflict between the Fifth Circuit's decision below and the Eighth Circuit's holding in *Randolph* could not be more sharply defined as evidenced by the *Randolph* Court's holding on the removal of a garnishment proceeding:

> "Since federal law controls on the question of whether the garnishment proceeding is a civil action, the classification which the Missouri Courts give garnishment proceedings is in no way binding upon us."

Randolph, 260 F.2d at 464.

Finally, in *McCarthy Western Constructors, Inc. v. Phoenix Resort Corp.*, 951 F.2d 1137, 1140 (9th Cir. 1991), the Ninth Circuit held that:

> "The removal jurisdiction of the Federal Courts is derived entirely from the statutory organization of Congress. We look to federal law to determine whether the elements of removal jurisdiction have been established under the statutes . . ."

Id.

Petitioner IPC submits that the direct and distinct conflict between the Fifth Circuit's decision below and the holdings of the Second, Fourth, Eighth and Ninth Circuits warrants the granting of this petition for a Writ of Certiorari.

III. The Fifth Circuit's Decision Below Also Directly Conflicts with Established Fifth Circuit Precedent.

Until the Fifth Circuit panel's decision, the Fifth Circuit has followed the Supreme Court precedents and construed the removal statutes under federal law. In fact, confronted with the indistinguishable issue of whether a garnishment action is an independent "civil action" for purposes of removal under 28 U.S.C. § 1441, the Fifth Circuit held such actions to be

removable as a matter of federal law. *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979). In so holding, the Court explicitly stated that "the proper characterization [of a post-judgment enforcement proceeding] under § 1441 is essentially a matter of federal law . . . ." *Id.* at n.7.

In a series of other decisions, the Fifth Circuit has recognized the need for a uniform federal interpretation of the laws governing removal. *See Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991); *Brown v. Demco, Inc.*, 792 F.2d 478, 480 (5th Cir. 1986); *Paxton v. Weaver*, 553 F.2d 936, 940 (5th Cir. 1977); *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (5th Cir. 1970). In *Roadway*, the issue was whether Texas law controls the interpretation of 28 U.S.C. § 1445(c), which prevents the removal of a "civil action in any State court arising under the workmen's compensation laws of such State". 931 F.2d at 1091. The Fifth Circuit expressly held that state law cannot provide the basis for interpreting a federal removal statute. *Id.* In rejecting the application of state law, the Fifth Circuit reasoned that the Texas precedents "neither could nor did decide whether for the purposes of section 1445(c) an article 8307C claim arises under the compensation laws of Texas". *Id.*

The Fifth Circuit panel erred by holding that the scope of the Texas turnover statute determines IPC's right of removal. In determining that the issue upon remand to the district court is "whether, *under Texas law*, a plaintiff may seek turnover relief from a new defendant by alleging" a fraudulent conveyance (App. 8a (emphasis added)), the panel created an irreconcilable conflict with *Shamrock's* dictate that § 1441 "must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts". 313 U.S. at 104. While departing from the precedents of the Supreme Court and of the Fifth Circuit which recognize that the interpretation of the removal statutes is governed by federal law, the panel apparently did not recognize the conflict its decision would create. It failed to explain why the meaning of "civil action" in § 1441, in the circumstances of this particular case, should be determined by

state law, while the meaning of "defendant" should be determined by federal law. *See id.* at 107-108.

The rule of state law incorporation adopted by the Fifth Circuit panel is flawed both in its reasoning and in its result. A federal statute should be construed by its plain language and, to the extent the language is ambiguous, with reference to legislative intent. *See Toibb v. Radloff*, 501 U.S. __, __, 111 S.Ct. 2197, 2200 (1991). But Congress could not and did not intend that the right of removal should depend upon state law. *See Shamrock*, 313 U.S. at 104. Were state law to define "civil action", a defendant's right to a federal forum would differ depending upon state procedural rules, completely undermining the requirement of *Grubbs* and *Shamrock* that the removal statutes must be construed to have "uniform nationwide application". *Grubbs*, 405 U.S. at 705. Thus, under the panel's decision, a defendant could remove a garnishment action brought in Mississippi, *see Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 931 (S.D. Miss. 1975), but could not remove the same action if filed in Michigan, *see Action Auto Stores, Inc. v. United Capital Insurance Co.*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992) (a copy of which is annexed hereto as Appendix E), because of disparate characterizations of the proceedings under varying state laws.[5] Conversely, to the extent state law treats post-judgment proceedings involving the same parties as new actions, state law could also expand the scope of a defendant's right of removal. The Fifth Circuit panel's rule thereby encourages forum shopping.[6]

A second problem with construing § 1441 by reference to state law is that the resolution of questions of state procedure

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[5] In *Action Auto* the United States District Court for the Western District of Michigan held that a garnishment proceeding against a stranger to the underlying litigation is subject to removal, even though under Michigan law such proceedings are ancillary to the original action. 1992 WL 21203 at *2. (App. 3e-4e)

[6] Respondents have a history of using every conceivable procedural device to improperly avoid the jurisdiction of the federal courts. *See* pp. 2-3, *supra*.

will necessarily reflect different considerations from those which should shape the interpretation of the removal statutes. While *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223 (Tex. 1991), and *Republic Insurance Company v. Millard*, 825 S.W.2d 780 (Tex. App. Houston [14th Dist.] 1992, no writ), for instance, squarely hold that a plaintiff may not enforce a judgment against a stranger to the original action by means of a turnover proceeding, they do so by interpreting the scope of the turnover statute, without any consideration of whether the third party's removal rights would be lost if the turnover statute were broadly construed. However, in our case, the reason the action is subject to removal under federal law is that the parties and liability issues in the post-judgment enforcement action are distinct from those involved in the underlying litigation, such that the new proceeding should be treated as a separate "civil action", regardless of its characterization under state law. *See Butler*, 592 F.2d at 1296.

CONCLUSION

For the reasons stated above, Petitioner International Paper Company requests this court to issue a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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August 10, 1992

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APPENDIX A

APPENDIX A

961 F.2d 558

In re INTERNATIONAL PAPER COMPANY, Petitioner.

Alexander GRASSI, Sr., etc.,
Plaintiffs-Appellees,
v.
INTERNATIONAL PAPER COMPANY,
Defendant-Appellant.
Nos. 91-6363, 91-6364.
United States Court of Appeals,
Fifth Circuit.
June 1, 1992.

Plaintiffs who obtained default judgment in products liability action against alien corporation filed application for turnover relief in Texas court that entered original judgment, seeking order requiring turnover of interest in related domestic corporation for execution. After turnover application was removed to federal court and remanded, on ground that it was continuation of prior litigation, transferee purchased domestic corporation and other related businesses. Plaintiffs voluntarily dismissed their original turnover action and filed amended application for turnover relief, naming transferee as defendant and asserting fraudulent transfer claim. Transferee removed action to federal court. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., granted plaintiffs' motion to remand, and transferee appealed and petitioned for writ of mandamus. The Court of Appeals, Reavley, Circuit Judge, held that: (1) remand order was reviewable, and (2) district court did not have authority to remand based on "the spirit of federalism."

Petition granted, remand order vacated, and case remanded to district court; appeal dismissed.

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Neil Norquest, Gordon L. Briscoe, Harlingen, Tex., Norton A. Colvin, Jr., Rodriguez, Colvin & Chaney, Brownsville, Tex., for plaintiffs-appellees.

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Russell H. McMains, Corpus Christi, Tex., real party in interest for I.R.I. Internacional Limitada.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

Appeal from the United States District Court for the Southern District of Texas.

Before SNEED [FN*], REAVLEY and BARKSDALE, Circuit Judges.

FN* Circuit Judge of the Ninth Circuit, sitting by designation.

REAVLEY, Circuit Judge:

The district court remanded this case to state court "in the spirit of federalism." Because the district court lacked authority to remand on that ground, we grant International Paper Company's petition for a writ of mandamus and vacate the district court's remand order.

I. BACKGROUND

In 1983, Alexander and Karen Grassi, acting individually and as next friends of their three children, filed suit in Texas state court alleging that the insulation in their home released formaldehyde gases that caused them physical and emotional injuries. The Grassis ultimately joined Ciba Geigy PLC (CG-PLC), an English corporation which manufactured the insulation, as a defendant in the case. CG-PLC received notice in 1985 but failed to appear. On September 28, 1986, the state court entered a default judgment against CG-PLC for $21,382,843.

While investigating ways to enforce this judgment, the Grassis discovered that CG-PLC owned all of the shares of another English corporation, Ilford Limited, which in turn owned all of the shares of Ilford Photo Corporation, a Delaware corporation with headquarters in New Jersey. Ilford Photo was apparently the only asset that CG-PLC owned or controlled in the United States. On October 26, 1988, the Grassis filed an application for turnover relief in the Texas court that entered the original judgment, seeking an order requiring Ilford Limited, on behalf of CG-PLC, to turn over the Ilford Photo shares to the county sheriff for execution. Under the Texas "turnover statute," a court may order a judgment debtor to turn over nonexempt property that is "in the debtor's possession or is subject to the debtor's control." TEX.CIV.PRAC. & REM. § 31.002(b)(1) (Vernon 1986). As permitted by the turnover statute, the Grassis filed the application for turnover relief as a continuation of the suit that they originally filed in 1983. *See id.* § 31.002(d).

Ilford Photo removed the turnover proceeding to federal court on November 23, 1988, alleging federal diversity jurisdiction under 28 U.S.C. § 1332. The Grassis moved for remand to state court, arguing that, because the turnover proceeding was a continuation of the suit that they originally filed in 1983, 28 U.S.C. § 1446(b) prevents removal. Under section 1446(b), "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." The district court agreed with the Grassis and remanded the case on March 14, 1989.

During the delay caused by the removal and remand, Ciba Geigy Limited (CG-Limited), which owns CG-PLC, pursued plans to sell its interest in Ilford Photo. Less than a month after the district court remanded the turnover application to state court, International Paper Company purchased Ilford Photo and other related businesses from CG-Limited for $241 million. As part of this deal, CG-Limited agreed to indemnify International Paper for any losses that might arise from the pending turnover proceeding.

On August 29, 1990, the Grassis voluntarily dismissed their original turnover action and filed an amended application for

turnover relief (the Amended Application) in the state court. The Grassis named International Paper as a defendant in the Amended Application, and alleged that International Paper purchased Ilford Photo in violation of the Uniform Fraudulent Transfer Act (UFTA), TEX.BUS. & COM.CODE §§ 24.001-.013 (Vernon 1987). The Grassis asked the state court to: (1) hold that, under section 24.008(a)(1) of the UFTA, the transfer of Ilford Photo was void to the extent necessary to satisfy the original judgment; and (2) order International Paper to turn over the Ilford Photo shares that it fraudulently acquired. Like the original application, the Grassis filed the Amended Application as a continuation of the suit that they originally filed in 1983.

International Paper removed the Grassis' Amended Application to federal court on September 21, 1990. In its notice of removal, International Paper asserted that the fraudulent transfer claim constitutes a new and independent civil action and thus is removable despite the one-year rule of section 1446(b). CG-PLC did not join International Paper's notice of removal. On October 10, 1990, the Grassis filed a motion to remand, in which they argued that: (1) because the fraudulent transfer claim is part of the Amended Application for turnover relief, it is not a new and independent action and thus section 1446(b)'s one-year rule prohibits removal; and (2) because the transfer was fraudulent, CG-PLC retained an equitable interest in Ilford Photo and thus CG-PLC's failure to join in International Paper's notice of removal required remand.

The district court granted the Grassis' motion to remand on December 13, 1991. Because the parties dispute the district court's reason for granting remand, we quote much of the district court's order:

> After extensively reviewing the pleadings, the motions and the numerous accompanying briefs, it seems one question is begging to be asked before a motion to remand can be granted. That question concerns whether or not fraud has occurred. If there is no fraud, then this case rightfully belongs in this court as a separate and independent action court under diversity jurisdiction. On the other hand, if fraud exists, the plaintiffs' claim to the contested property is a

direct extension of the state court suit for turnover relief and properly belongs in state court because of Ciba Geigy PLC's delay in filing for removal. Though on its face [International Paper] is a "new" party, that again is entangled in the issue of whether fraud exists.

In *American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit dealing with the application of the Texas Fraudulent Transfers Act stated such an action was:

> essentially one for property which properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put out of reach of the creditors . . . . The transferee may have colorable title to the property, but the equitable interest—at least as far as the creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it.

Id. at 1275. If this court were to delve into the existence of fraud in determining whether this case should be remanded, then the heart of the litigation would be settled. If it was found fraud existed, this court would have to remand to state court with the bulk of the matter predetermined before the state fact finder had an opportunity to make its own findings. In the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.

On December 30, 1991, International Paper filed a notice of appeal and, alternatively, a petition for writ of mandamus. We consider these together.

II. DISCUSSION

A. REVIEWABILITY

Whenever a party asks this court to vacate or reverse a district court's remand order, "the threshold question that confronts us is whether we have jurisdiction to consider [the] petition." *In re Allied-Signal, Inc.* 919 F.2d 277, 279 (5th Cir. 1990). "An order remanding a case to the State court from which

it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). The Supreme Court has construed section 1447(d) *in pari materia* with section 1447(c) and concluded that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976). In light of Congress' post-*Thermtron* amendment of section 1447(c), this court has concluded that "remand orders for lack of subject matter jurisdiction [are] the only clearly unreviewable remand orders." *In re Shell Oil Co.*, 932 F.2d 1518, 1520 (5th Cir. 1991), *cert. denied*, — U.S. —, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992). Although it is an open question, section 1447(d) may also prevent us from reviewing remand orders that are based on a timely-filed motion that alleges a "defect in removal procedure." *See id.* at 1520 n. 5; *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 (5th Cir. 1991). We need not reach that question in this case.

The Grassis contend that section 1447(d) prevents us from reviewing this remand order because the district court based it on a lack of subject matter jurisdiction and on a timely motion alleging a defect in removal procedure. According to the Grassis' interpretation of the remand order, the district court accepted their arguments that section 1446(b)'s one-year rule and CG-PLC's failure to join the notice of removal required remand. We disagree. The district court believed that the one-year rule would require remand *if* the transfer of Ilford Photo to International Paper was fraudulent because, in that case, the existence of fraud would allow the turnover action to proceed against International Paper as an extension of the 1983 suit. But the court also believed that, if it determined that fraud was involved in the transfer, there would be little left to remand because the existence of fraud was the essential fact issue in the turnover proceeding. So the court remanded the case because "[i]n the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court."

Because the district court remanded this case "in the spirit of federalism," and not because it lacked subject matter jurisdiction or because of a defect in removal procedure, section 1447(d) does not prevent us from reviewing the remand order.

B. REVIEW BY APPEAL OR MANDAMUS?

We now consider whether we review the district court's remand order by appeal or mandamus. *McDermott* recently addressed this question, and we need not repeat that discussion here. *See* 944 F.2d at 1201-04. When a district court has remanded a case without authority to do so, we review by mandamus. *Id.* at 1203 (citing *Thermtron*, 423 U.S. at 352-53, 96 S.Ct. at 594). Presumably, we will always vacate a remand order that we review by mandamus because the district court lacked authority to remand the case on the stated grounds. If, however, the district court had authority to remand on the stated grounds, we review by appeal to determine whether the court properly exercised its authority in that particular case. *Id.* at 1203-04.

As this court explained in *McDermott*, there are three potential sources of a district court's authority to remand a case: (1) statutes that grant such authority; (2) a contract between the parties; and (3) circumstances that give the court discretion to dismiss the case. *Id.* at 1204. The district court in the present case, however, based its remand order on "the spirit of federalism," and not on one of these three sources. Because the district court remanded this case without authority to do so, we review by mandamus and vacate the district court's remand order.

C. DISPOSITION

We remand this case for the district court to consider the merits of the Grassis' motion to remand, and we offer the following guidance for the court's consideration. The Grassis argued that section 1446(b)'s one-year rule and CG-PLC's failure to join International Paper's notice of removal made removal improper. If the Grassis' Amended Application is a continuation of the action filed in 1983, then the Grassis are correct. The

district court believed that, to determine whether it could treat the Amended Application as a continuation of the suit filed in 1983, it needed to determine whether there was fraud in the transfer of Ilford Photo. But the question is actually whether, under Texas law, a plaintiff may seek turnover relief from a new defendant by alleging that the new defendant obtained the property in violation of the UFTA and thus the original defendant (the judgment debtor) retains ownership or control of the property. The key jurisdictional question is not, as the district court believed, whether there was in fact fraud in the transfer, but whether the Grassis can seek to prove that there was fraud in the transfer as part of their attempt to obtain relief under the turnover statute.

If the district court determines that the Grassis can allege that International Paper is a fraudulent transferee as part of their claim for turnover relief, then the Amended Application is an extension of the 1983 suit and the district court must remand this case to state court under the one-year rule of section 1446(b). If the Grassis cannot include the fraud claim in the turnover application, then the Amended Application asserts a fraudulent transfer claim against International Paper that is separate and independent from the 1983 suit.

We GRANT the petition for mandamus, VACATE the district court's remand order, and REMAND the case to the district court. International Paper's appeal is DISMISSED.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ALEXANDER GRASSI, SR. and KAREN S. GRASSI, INDIVIDUALLY and as next friends of ALEXANDER GRASSI, JR., WENDI LU GRASSI and KRISTEN SUZANNE GRASSI, minors, and I.R.I INTERNACIONAL LIMITADA v. INTERNATIONAL PAPER COMPANY and CIBA GEIGY PLC	CIVIL ACTION NO. B-90-174

Memorandum and Order

This case comes before this court after many other appearances in both the state and federal arena. The plaintiffs obtained a default judgment against Ciba-Geigy PLC ("PLC"), a British corporation, on September 26, 1986. On October 26, 1988, the plaintiffs attempted to collect their judgment by filing an application for turnover relief. In that action, the plaintiffs asked PLC to "turn over" for execution shares of Ilford Photo Corporation of New Jersey. Though Ilford had nothing to do with the actions which gave rise to the default judgment upon which the plaintiffs are now seeking to collect, Ilford was owned by a corporation which was and still is completely owned by PLC.

This action was removed by Ilford on November 23, 1988 because the motion to remove was filed more than one year after commencement of the suit. *See* this court's memorandum and order of March 14, 1989. While this action was pending before this court, Ciba-Geigy, Ltd, the owner of PLC issued a

letter of intent to sell the Ilford group to the International Paper Company ("IPC").[1] Shortly after this court remanded, the Ilford group was sold. IPC claims that this transaction was contemplated well before the plaintiffs began their turnover suit.

On August 29, 1990, plaintiffs filed their amended application for turnover relief in state court as an extension of the suit which was remanded by this court by the March 14, 1989 order. In this amended suit, plaintiffs asked the state court to hold that the judgment debtor's (PLC) transfer of the shares of Ilford to IPC was done for illegal and dilatory reasons and was therefore void as to plaintiffs to the extent necessary to satisfy plaintiffs [sic] judgment against PLC. Plaintiffs asked the state court to direct IPC to turnover, for execution, the shares of Ilford knowingly acquired pursuant to a fraudulent transaction. IPC removed to this court claiming it was an innocent third party and a turnover proceeding was an independent separate action which may be removed to federal court.

After extensively reviewing the pleadings, the motions and the numerous accompanying briefs, it seems one question is begging to be asked before a motion to remand can be granted. That question concerns whether or not fraud has occurred. If there is no fraud, then this case rightfully belongs in this court as a separate and independent action court under diversity jurisdiction. On the other hand, if fraud exists, the plaintiffs' claim to the contested property is a direct extension of the state court suit for turnover relief and properly belongs in state court because of Ciba Geigy PLC's delay in filing for removal. Though on its face IPC is a "new" party, that again is entangled in the issue of whether fraud exists.

In *American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit dealing

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[1] There seems to have been several independent Ilford corporations existing in several different nation [sic]. The Ilford involved in this litigation was one of several.

with the application of the Texas Fraudulent Transfers Act stated such an action was:

> essentially one for property which properly belongs to the debtor and which the debtor has fraudulently transferred in an effort to put out of reach of the creditors . . . . The transferee may have colorable title to the property, but the equitable interest—at least as far as thee [sic] creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it.

Id. at 1275. If this court were to delve into the existence of fraud in determining whether this case should be remanded, then the heart of the litigation would be settled. If it was found fraud existed, this court would have to remand to state court with the bulk of the matter predetermined before the state fact finder had an opportunity to make its own findings. In the spirit of federalism it would be wiser to leave this essential finding in the hands of the state court.

Accordingly we REMAND.

DONE in Brownsville, Texas, this 13th day of December 1991.

Filemon B. Vela
UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6363 and
91-6364

IN RE: INTERNATIONAL PAPER COMPANY,

Petitioner.

U.S. COURT OF APPEALS

FILED
JUNE 30, 1992

GILBERT F. GANUCHEAU
CLERK

ALEXANDER GRASSI, SR., ETC.,

Plaintiff-Appellee,

versus

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 1, 1992, 5 Cir., 198_, _____F.2d_____)

(JUNE 30, 1992)

Before SNEED*, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

*Circuit Judge of the Ninth Circuit, sitting by designation.

APPENDIX D

APPENDIX D

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX E

APPENDIX E

1992 WL 21203

ACTION AUTO STORES, INC.,
a Michigan corporation, Plaintiff,
v.
UNITED CAPITOL INSURANCE COMPANY, Garnishee-defendant,
and
Oscar W. Larson Company,
a Michigan corporation, Defendant.
No. 5:91-CV-32.
United States District Court, W.D. Michigan, S.D.
Jan. 13, 1992.

L. David Lawson, Winegarden, Shedd, Haley, Lindholm & Robertson, Flint, Mich., for Action Auto Stores, Inc.

Constantine N. Kallas, Leonard A. Henk, Kallas, Lower, Henk & Treado, PC, Bloomfield Hills, Mich., for United Capitol Insurance Company.

OPINION DENYING PLAINTIFF'S MOTION TO REMAND

BENJAMIN F. GIBSON, Chief Judge.

*1 This case is before the Court on plaintiff Action Auto Stores' motion for remand based on lack of jurisdiction. Plaintiff maintains that garnishment actions are ancillary or supplemental proceedings and thus not removable under Title 28 United States Code Section 1441. Plaintiff also contends that even if this Court finds that garnishment actions are generally removable, this particular action should be remanded because there is not complete diversity between the parties.

I.

In 1988, Oscar W. Larson Company ("defendant") filed various actions in state court for money it claimed plaintiff owed it for work done at Action Auto locations. Plaintiff

counterclaimed alleging that defendant had negligently installed a gasoline containment system. Plaintiff also sued defendant in a separate action alleging that it failed to remove contaminated soil from several Action Auto locations.[1]

The parties entered a partial settlement prior to trial. According to the settlement, defendant dismissed its claims with prejudice. In return, plaintiff dismissed some of its claims and agreed not to execute on or enforce a judgment against any of defendant's assets except on those arising out of insurance policies or contracts. Defendant apparently stopped contesting some claims and a default was entered in the amount of $2,197,000.00. Plaintiff's other claims were tried in state court where a jury rendered a verdict of two million dollars against defendant.

Plaintiff filed a writ of garnishment in the Ingham County Circuit Court against United Capitol Insurance Company ("garnishee"). Garnishee filed a garnishee disclosure statement in which it alleged that it was not indebted to defendant and that, therefore, it should not be subject to garnishment. Garnishee argued that no underlying debt existed since the settlement agreement released defendant from liability and also argued that various provisions in the insurance policy prevented garnishment. On May 15, 1991, garnishee filed a petition for removal with this Court. Plaintiff subsequently filed its motion to remand.

II.

The United States Judicial Code states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. s 1447(c). In reviewing plaintiff's motion, the Court must determine whether it has jurisdiction over the case. If it does not, the case must be immediately remanded. Doubts about whether jurisdiction exists should be construed against removal. *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979); *ANR Pipeline*

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[1] The actions were consolidated.

Company v. Conoco, Inc., 646 F.Supp. 439, 442 (W.D.Mich. 1986).

The federal removal statute provides, in part, that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States. . . ." 28 U.S.C. s 1441(a) (emphasis added). Thus, any proceeding that cannot properly be labeled a civil action is not removable. The statute further provides that "whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed. . . ." 28 U.S.C. s 1441(c). When a claim is merely ancillary to a nonremovable claim, the claims may not be removed to federal court under Section 1441(c). Supplementary proceedings and proceedings which are but continuations of prior suits are not removable. *Federal Savings and Loan Insurance Corporation*, 419 F.2d 1014 (7th Cir. 1969) (citing *Barrow v. Hunton*, 99 U.S. 80 (1879)).

III.

***2** It is clear that no grounds for federal jurisdiction are present in the underlying state action between Action Auto and Larson as the case involved neither federal questions nor diverse parties. If the present garnishment action is classified as merely ancillary to the state contract case, it is not removable. Neither party argues that ancillary actions are removable; the issue contested in this litigation is whether a garnishment action is properly labeled an ancillary action or whether it is a separate and independent civil action.

Michigan courts have held that garnishment actions should be classified as ancillary. *Stevens v. Northway*, 293 Mich. 31, 291 N.W. 211 (1940), *aff'd*, 312 U.S. 563 (1941); *Ward v. Detroit Auto. Inter-Insurance Exchange*, 115 Mich.App. 30, 320 N.W.2d 280 (1982). There is a split in authority, however, about whether a state court's characterization of its garnishment proceedings is dispositive in determining removability. *See Drs. Macht, Podore & Associates, Inc. v. Girton*, 392 F.Supp. 66, 67 (S.D.Ohio 1975)

and cases cited therein. The issue has not been addressed by the Sixth Circuit.

The Supreme Court has determined that a state's procedure cannot control the privilege of removal granted by federal statute. *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Allowing the state's labeling of its garnishment procedure to control this Court's determination about whether the action is removable might well be inconsistent with the *Chicago R.I. & P.R.* decision. *Drs. Macht, Podore & Associates*, 392 F.Supp. at 67; 1A James Moore, Moore's Federal Practice P 0.167 (2d ed. 1991); *see also Stewart v. EGNEP (Pty), Ltd.*, 581 F.Supp. 788, 789-90 (C.D.Ill.1983). The Court thus holds that it is not bound by state law but must make its own determination about whether the proceedings are ancillary.

Plaintiff argues that even if this Court decides that it may not merely adopt the label that the state court has attached to its garnishment proceedings, the state's interpretation of its garnishment law should nonetheless be entitled to great weight. See Plaintiff's brief at 4-5 (*citing Swanson v. Liberty National Insurance Company*, 353 F.2d 12, 13 (9th Cir.1965)). The Court agrees but finds that it is not merely the state's characterization of the action that is entitled to deference. The Court must also look to the procedural law that the state has enacted to implement garnishment and determine if, in fact, the procedure treats the action as separate and independent. *See Richmond v. Allstate Ins. Co.*, 624 F.Supp. 235 (E.D.Pa.1985) (stating that substance rather than form should determine ancillariness). The Michigan Court Rules state that if there is a dispute about a garnishee's liability, "the issue shall be tried in the same manner as other civil actions." M.C.R. s 3.101(M)(1). Michigan allows parties to file a jury demand (M.C.R. s 3.101(M)(4)) and to engage in discovery (M.C.R. ss 3.101(J)(3) and 3.101(M)(2)). Such rules indicate that, despite the label placed upon the action, the proceedings are treated in many ways as separate civil actions.

***3** Other courts which have found garnishment actions to be removable have based their holdings on the fact that the garnishments involve new parties with different interests than those present in the underlying actions. *Berry v. McLemore*, 795

F.2d 452, 455 (5th Cir.1986); *Butler v. Polk*, 592 F.2d at 1296; *Stewart v. EGNEP (Pty), Ltd.*, 581 F.Supp. at 790; *see also Graef v. Graef*, 633 F.Supp. 450, 453 (E.D.Pa.1986). The case before this Court certainly involves such factors. The underlying state action was to determine whether or not defendant polluted plaintiff's work sites by doing work negligently or by failing to remove contaminated soil. The garnishment action does not deal with this subject at all. Garnishee does not assert that defendant is not liable to plaintiff; instead, it contends that, for various reasons, it does not owe defendant any money and thus cannot be garnished for the benefit of the plaintiff.[2] The Court holds that the action is thus separate and independent from the state case.

IV.

Even though the Court has determined that this garnishment is an independent action, it is still not removable unless this Court has subject matter jurisdiction over the case. No party argues that the case involves a federal question; therefore, the Court only has jurisdiction if the requirements of diversity jurisdiction are met. Section 1332 of the United States Code which outlines the requirements of diversity jurisdiction has long been interpreted to require complete diversity between the parties. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Plaintiff argues that the case must be remanded because both it and defendant Oscar W. Larson Company are Michigan corporations. Garnishee contends that the parties are, in fact, diverse because defendant is merely a nominal party with no real interest in the case. Garnishee also claims that the parties should be realigned since defendant's

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[2] Plaintiff cites *Richmond v. Allstate Insurance Company*, 624 F.Supp. 235 (E.D.Pa.1985) and *Overman v. Overman*, 412 F.Supp. 411 (E.D.Tenn.1976) in support of its position that garnishment actions are not removable. These cases hold garnishment is ancillary because such actions depend upon the existence of a valid judgment. Thus, garnishment is merely a final step the plaintiff must take to get relief. *Overman*, 412 F.Supp. at 412. The Court is not persuaded by this reasoning. Although it is true that obtaining a valid judgment is a prerequisite to garnishment, this does not determine the nature of the action itself. Because the garnishee can raise issues wholly different than those litigated by plaintiff and defendant in the initial trial, the garnishment proceeding is an independent action.

interests coincide more with those of the plaintiff than those of the garnishee.

The Supreme Court has said that a federal court must "look beyond the pleadings and arrange the parties according to their sides in the dispute." *Dawson v. Columbia Ave. Sav. Fund S.D., T. & T.C.*, 197 U.S. 178, 180 (1905); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941). Garnishee cites cases holding that a defendant's interests are aligned with those of plaintiff's in garnishment proceedings. The Court need not determine whether this is generally the case, as the settlement agreement signed by defendant indicates that its interests are aligned with those of plaintiff in this particular action.

Through that agreement, the parties determined that any judgment against defendant would be collected from proceeds of insurance policies. By entering such an agreement, defendant prevented plaintiff from taking its other assets by directing it to its insurance proceeds. It has thereby demonstrated its interest in having the judgment satisfied through insurance proceeds instead of other assets.[3] As the Court has determined that the parties should be realigned, it need not reach the issue of whether defendant should be considered a nominal party.

V.

***4** For the reasons stated above, plaintiff's motion to remand is hereby denied. The Court will not award either party costs of the proceeding.

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[3] Garnishee asserts that in the settlement agreement defendant also promised to help plaintiff effectuate judgment against the insurers. The Court notes that such an agreement, if made, would be more evidence indicating the necessity of realignment.